No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

Questions Presented

1. Does a defined pension plan that integrates plan benefits with statutory workers' compensation benefits by reducing the one by the other violate §203(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1053(a)?

2. Is N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the New Jersey laws of 1977, which would prohibit integration of workers' compensation benefits with normal retirement benefits, preempted by ERISA under the Supremacy Clause and §514(a) of ERISA, 29 U.S.C. §1144 (a), as it applies to a pension plan subject to ERISA?

Parties to the Proceeding

The parties to the proceeding are set forth at page ii of the Brief of Petitioners, except that the correct name of the respondent is General Motors Corporation.*

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* Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of respondent General Motors Corporation: Colmotores, Bogota, Columbia; General Motors Iran Limited, Tehran, Iran; Isuzu Motors Limited, Tokyo, Japan; GM Allison Japan Limited, Tokyo, Japan; General Motors Kenya Limited, Nairobi, Kenya; Saehan Motor Company, Ltd., Seoul, Korea; General Motors Pilipinas, Inc., Manila, Philippines; Saudi American Machinery Maintenance Company, Ltd., Jeddah, Saudi Arabia; and Industria Delova Automobile, Kikinda, Yugoslavia.

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BRIEF OF RESPONDENT

Statement of the Case

Petitioners Henry Buczynski and Alex Borusovic were hourly employees of respondent General Motors Corporation (hereinafter referred to as "GM") at its Clark, New Jersey, Plant and participants in the General Motors Hourly-Rate Employes Pension Plan (hereinafter referred to as the "GM Pension Plan"), retiring thereunder on January 1, 1972 and March 31, 1973, respectively. On June 25, 1976 and July 2, 1976, respectively, petitioners filed Claim Petitions for Workers' Compensation Benefits, receiving Judgments thereon against GM on April 7, 1977 and February 11, 1977, respectively, in the sums of $2,500 and $2,300. On or about June 22, 1977, both petitioners received an Authorization of Adjusted Monthly Benefits from GM providing for deductions commencing August 1, 1977 from their respective pension benefits under the GM Pension Plan. (J.A.9a-12a)

Such deductions were then and are still authorized under the provisions of Article IV, Section 2 of the GM Pension Plan, as set forth in Exhibit A-1 to the Agreement between GM and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter referred to as the "Union"), dated November 19, 1973, as modified November 22, 1976, which provides that:

> "Section 2. Deductions for Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority." (J.A.31a)

Substantially identical provisions were in effect in the predecessor GM Pension Plans constituting Exhibit A-1 to the Agreements between GM and the Union dated November 11, 1970 and November 19, 1973 (J.A.28a-30a).

On August 5, 1977, petitioners filed a complaint in the Superior Court of New Jersey, Chancery Division, Union County, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated" (J.A.8a-15a) alleging that Article IV, Section 2 of the GM Pension Plan violates N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey (hereinafter sometimes referred to as "Chapter 156"), which provides that:

> "The right of compensation granted by this chapter [the New Jersey Workers' Compensation Law] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

The action was removed to the United States District Court for the District of New Jersey on August 9, 1977 (J.A.18a-20a).

On December 7, 1977 and May 10, 1978, the parties filed stipulations of facts (J.A.42a-51a). On August 9, 1978, an Order Certifying Class Action, Etc. was entered by consent of the parties (J.A.52a-53a).

On August 24, 1978, the district court issued a memorandum opinion holding that Article IV, Section 2 of the

GM Pension Plan is unlawful under §203(a) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. §1053(a), and N.J. Stat. Ann. 34:15-29, as amended by Chapter 156, and that such state statute is not preempted by ERISA (J.A. 54a-69a). At the instance of the district court, GM, on September 29, 1978, moved for reconsideration. On December 20, 1978, the district court issued an opinion (J.A. 70a-79a) and order (J.A.80a) adhering to the previous decision embodied in its opinion of August 24, 1978.

By order entered April 3, 1979, the district court enjoined GM "from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2" of the GM Pension Plan, and directed GM to pay over to them the amount of deductions made from their basic pension benefits payable as a result of having reached normal retirement age, with interest, staying the judgment pending appeal (J.A.86a-87a).

On April 12, 1979, GM timely filed a notice of appeal from such order to the United States Court of Appeals for the Third Circuit (J.A.88a). On January 8, 1980, oral argument was held therein and in *Joseph Alessi, et al.* v. *Raybestos-Manhattan, Inc., et al.*, No. 79-1943 herein. On February 15, 1980, the Third Circuit issued a single opinion in both appeals (J.A.89a-118a) and a judgment in lieu of mandate (J.A.119a-21a) vacating the judgments of the district court in both causes and remanding the causes to the district court for entry of judgments for the defendants in each cause.

On August 8, 1980, petitioners filed a petition for writ of certiorari herein, which writ was granted November 3, 1980 and the cause consolidated with the appeal of the plaintiffs-appellants in *Alessi*, in which this Court, on the same date, noted probable jurisdiction.

Summary of Argument

I.

The language and legislative history of §203(a) of ERISA, 29 U.S.C. §1053(a), demonstrate that its requirement of nonforfeitability of an employee's right to his normal retirement benefit upon the attainment of normal retirement age does not preclude or even apply to the integration of statutory benefits, including state workers' compensation benefits, as is provided in Article IV, Section 2 of the GM Pension Plan. Such integration was approved, prior to ERISA, under long-standing administrative construction of §401(a)(5) of the Internal Revenue Code of 1954, as amended (hereinafter referred to as the "Code"), 26 U.S.C. §401(a)(5), which was reenacted, without relevant amendment, as part of ERISA. This administrative construction was reaffirmed post-ERISA and is consistent with 26 C.F.R. §1.411(a)-4(a) (1980), a regulation adopted by the Secretary of the Treasury pursuant to an express grant of authority in §3002(c) of ERISA, 29 U.S.C. §1202(c). It is, moreover, fully consistent with the principle of nonduplication of private pension plan benefits and nonplan benefits both antedating and postdating ERISA. Deductions pursuant to Article IV, Section 2 of the GM Pension Plan, therefore, do not constitute forfeitures in violation of §203(a) of ERISA and are entirely lawful thereunder.

II.

Congress has unmistakably ordained in §514(a) of ERISA, 29 U.S.C. §1144(a), as its legislative history clearly shows, that the principle of federal preemption expressed therein apply in its broadest sense to foreclose any state law relating to ERISA-covered employee benefit plans such as to the GM Pension Plan. N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey, directly "relates to" and affects the GM Pension Plan and, therefore, is preempted by ERISA insofar as it applies to the GM Pension Plan.

ARGUMENT

I.

The workers' compensation integration provision in the GM Pension Plan is lawful under §203(a) of ERISA.

Petitioners premise their contention that Section 2 of Article IV of the GM Pension Plan is unlawful under ERISA upon §203(a) thereof, 29 U.S.C. §1053(a),[1] which provides, *inter alia,* that every pension plan subject to Title I of ERISA (as the GM Pension Plan is) "shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection."[2] ERISA §3(19), 29 U.S.C. §1002(19), defines "nonforfeitable" as meaning "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

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[1] Pursuant to ERISA §211(b)(2), 29 U.S.C. §1061(b)(2), ERISA §203(a) became applicable to the GM Pension Plan October 1, 1976, its first plan year beginning on or after January 1, 1976, but is inapplicable to forfeitures occurring thereafter with respect to individuals who retired before that effective date. *E.g., Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752, 755 (7th Cir. 1979); *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980); *Keller* v. *Graphic Systems of Akron Inc., Employees Profitsharing Plan,* 422 F.Supp. 1005, 1007-8 (N.D. Ohio 1976); Treas. Reg. 26 C.F.R. §1.411(a)-2(f) (1980).

[2] Subsection (1) of §203(a) relates to plans providing for employee contributions. The GM Pension Plan is not such a plan. Subsection (2) of §203(a) sets forth three basic alternative vesting schedules leading toward the acquisition by an employee of "a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." The extent to which petitioners have met this schedule is not in issue; that the GM Pension Plan complies therewith is conceded by petitioners (Brief of Petitioners 9).

Subsection (3) of §203(a) enumerates four types of conditions which will not be deemed to render a right to an accrued benefit derived from employer contributions forfeitable. None of these applies here.

Petitioners' argument is beguilingly simple. It is, first, that §203(a) of ERISA prohibits all forfeitures unless excepted by §203(a)(3); second, that the integration of workers' compensation benefits and pension plan benefits is a forfeiture not excepted by §203(a)(3); and third, that a pension plan provision authorizing such integration is, therefore, unlawful under §203(a).

As the Third Circuit recognized below, it is immediately apparent that petitioners' entire reasoning depends upon one critical premise: that workers' compensation benefit integration constitutes a forfeiture within the meaning of §§3(19) and 203(a) of ERISA. The Third Circuit correctly found this premise invalid under the literal language of ERISA, read in light of its legislative history and antecedents, and its authoritative construction by the agency charged with its interpretation, enforcement, and rulemaking functions. The failure of that premise necessarily brings down with it the entire structure of petitioners' argument, and the Third Circuit so held.

Since the decision of the Third Circuit below, two members of a panel of the Sixth Circuit, in *Utility Workers Union* v. *Consumers Power Co.*, —— F.2d ——, No. 78-1402 (6th Cir. Jan. 6, 1981), *aff'g* 453 F.2d 447 (E.D. Mich. 1978), *petition for reconsideration en banc pending*, reached the opposite result,[3] without, however, addressing or even referring to the reasoning of the Third Circuit, on which the third member of the panel based his

[3] Quite to the contrary were the prior decisions of two other judges of the same district court that decided *Utility Workers, Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. Jan. 10, 1978), and *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978), holding workers' compensation offsets valid.

(Footnote continued on following page)

dissenting opinion.[4] As will be demonstrated herein, the reasoning of the majority in *Utility Workers* is based upon several erroneous assumptions as to the structure and legislative history of the relevant provisions of ERISA that led them to a result totally at odds with the express language and intent of Congress.

A. The express statutory language defeats petitioners' contention that ERISA §203 precludes or affects workers' compensation benefit integration in the determination of the benefit under the plan.

The obvious starting point in the construction of any statute is, of course, its literal language and expressed intent. Petitioners' argument fails at this most basic level. It is necessary, in the first instance, to determine that to which the §203(a) requirement of nonforfeitability attaches. Plainly, it is the employee's right to his "normal retirement benefit," defined by §3(22) of ERISA, 29 U.S.C. §1002(22), as "the *benefit under the plan* commencing at

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Judge Pratt, who decided *Utility Workers* in the district court, was obviously unaware of, and, therefore, disregarded these decisions in recanting his own prior decision in *Carlson* v. *Bundy Mfg. Co.*, Civ. No. 6-72274 (E.D. Mich. Aug. 18, 1977). (Because these prior decisions do not agree with petitioners' reasoning, petitioners dismiss them as "minor" (Brief of Petitioners 18).) Following the Third Circuit decision below, a fourth judge of the same district court, in *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980), rejected Judge Pratt's reasoning. The Sixth Circuit opinion in *Utility Workers* fails to cite *Dotson.*

[4] The majority opinion cites the Third Circuit opinion below (followed by an erroneous "*cert. dismissed*" reference) in an introduction to its opinion, with a statement that "we find ourselves is [*sic*] disagreement with the position taken by the Third Circuit in *Buczynski*" (Slip Opin. 3). Thereafter, the majority fails even to cite the Third Circuit's opinion below.

normal retirement age" (emphasis added).[5] Therefore, to ascertain what is protected against forfeiture and what is not requires a determination of the benefit under the particular plan.

Under the GM Pension Plan, the benefit protected against forfeiture is a benefit that expressly takes into account workers' compensation benefits received by the individual plan participant under the circumstances set forth in Article IV, Section 2 thereof. Indeed, that provision expressly provides for the deduction of workers' compensation benefits "in determining the monthly benefit payable under this Plan." Thus, the workers' compensation deduction is as much a part of the calculation of a participant's "benefit under the plan" as the mathematical computation of his accrued benefit—itself defined, by §3(23)(A) of ERISA, 29 U.S.C. §1002(23)(A), in terms of the benefit "determined under the plan."[6]

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[5] Thus, §203(a) is inapplicable to early retirement or disability benefits payable prior to normal retirement age. *Hepple* v. *Roberts & Dybdahl, Inc.*, 622 F.2d 962 (8th Cir. 1980); *Riley* v. *MEBA Pension Trust*, 586 F.2d 968 (2d Cir. 1978); *Capocci* v. *General Motors Corporation*, 444 F.Supp. 1306 (D. Hawaii 1978). This was recognized by the district court in the order under appeal (JA86a).

[6] Therefore, the emphasis placed by petitioners (Brief of Petitioners 32-34) and by appellants in *Alessi* (Brief of Appellants 16-19) on the concept of a pension as a form of "deferred compensation" is meaningless. Granting the premise that pensions are a form of deferred compensation for which petitioners and their fellow employees bargained collectively through their Union in lieu of present cash wages, the obvious question is for what deferred compensation they so bargained. The answer is obvious: only for a pension determined by taking into account such amounts as may be received by the retired employee as workers' compensation benefits under circumstances for which Article IV, Section 2 of the GM Pension Plan prescribes a deduction. Thus, in the operation of the definition of the benefit under the plan, petitioners have received everything for which they bargained; neither less nor, as petitioners would have it, more.

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The benefit an individual will receive upon retirement is simply his accrued benefit mutiplied by his vesting percentage. The distinction between the entirely separate concepts of the structure and definition of the accrued benefit, on the one hand, and vesting and nonforfeitability, on the other, lies at the heart of the present case. As the juxtaposition of the terms within ERISA §203(a) indicates, the concept of "nonforfeitability" is inherently intertwined with the concept of "vesting." Indeed, the two together form a single concept.[7] All vesting does is to determine when and to what extent an employee has acquired a claim to a benefit such that no further service with the employer under whose plan the benefit is provided is required to qualify for that benefit.[8] It was to this concept, and only this concept, that Congress addressed the concern stated in §2(a) of ERISA "that despite the enormous growth in such [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans."[9] Congress met this concern by

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There is no contention by petitioners that the GM Pension Plan makes anything less than full and adequate disclosure of this to apprise all plan participants thereof in advance of their retirement. See n. 13, *infra*. Thus, the observations of appellants in *Alessi* concerning the disclosure requirements of ERISA (Brief for Appellants 21-22 nn. 16-17) are inapposite.

[7] *See* ERISA §3(25), 29 U.S.C. §1002(25), which defines "vested liabilities" as "the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are non-forfeitable."

[8] *See, e.g., Nachman Corporation* v. *Pension Benefit Guaranty Corporation,* 446 U.S. 359, 378 n. 27 (1980). The concept long antedates and is unchanged by ERISA.

[9] Not, as petitioners suggest, to a benefit definition that includes integration with workers' compensation benefits, which, perforce, form part of the "anticipated retirement benefits" which petitioners could expect to receive upon retirement.

mandating adoption of one or another of the vesting schedules provided in §203(a)(2), GM's compliance with which is conceded by petitioners.

The other element in the benefit equation—the accrued benefit which is protected against forfeiture—is nowhere addressed in §203(a). Therefore, the definition of what constitutes the accrued benefit must be sought elsewhere; specifically, in the plan provisions defining the "benefit under the plan." Assuredly, ERISA spells out in careful detail not merely the rate at which an employee's right to nonforfeitability vests, but also the rate of accrual of benefits,[10] the rate at which the employer must fund its obligation for such accrued liabilities,[11] and the form and payment of benefits.[12] However, there is nothing that regulates the structure of the benefit afforded to plan participants,[13] beyond the provision in ERISA §206(b), 29 U.S.C. §1056(b), and its counterpart, Code §401(a)(15), 26 U.S.C. §401(a)(15) (added by ERISA), imposing limitations upon the integration of benefits under the Social Security Act and the Railroad Retirement Act, which will be discussed more fully *infra*.

Therefore, to contend, as petitioners do, that a benefit determined by taking into account, by way of deduction or offset, amounts received under workers' compensation award violates ERISA §203(a), because such is not provided for therein, is to say nothing at all. The determination of the amount of the benefit under a pension plan is a matter outside the scope of §203(a).

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[10] ERISA §204, 29 U.S.C. §1154.

[11] ERISA §301 *et seq.*, 29 U.S.C. §1081 *et seq.*

[12] ERISA §§205 and 206, 29 U.S.C. §§1055 and 1056.

[13] That this structure may take into account "circumstances . . . which may result in a reduction or elimination of accrued benefits or of nonforfeitable benefits" is clear from the Secretary of Labor's proposed regulation requiring that such circumstances be described in the summary plan description mandated by ERISA §105(a), 29 U.S.C. §1025(a). See DOL Prop. Reg. 29 C.F.R. §2520.105-2(e)(5)(iii), 45 Fed. Reg. 51321 at 51329 (Aug. 1, 1980).

The foregoing is fully consistent with this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980).[14] Petitioners and appellants in *Alessi* invoke and seek to read much into Justice Stevens' statement, in a footnote reference to §203(a) in his opinion for the Court, that:

> "A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date." 446 U.S. at 366 n. 10.

Both petitioners and appellants juxtapose this quotation with the later reference in the opinion to Congress' wishing to make "sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it." 446 U.S. at 375. However, that reference was to the finding by Congress, in §2(a), "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." Obviously, as pointed out above, those observed problems bear no relation to §203(a) or the question now before the Court, and the statements by the Court, though valid in *Nachman*, are *obiter* here.[15]

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[14] *Nachman*, of course, involves the construction and application of the plan termination provisions of Title IV of ERISA, not directly involved herein, and the Court's references in its opinion to §203 of ERISA should be read in that light.

[15] The reference would be irrelevant even if it were to the problem of the loss of benefits through failure to meet vesting requirements also addressed in ERISA §2(a), 29 U.S.C. §1001(a), since, as noted at pp. 10-11, *supra*, Congress sought to resolve that problem by mandating the vesting schedules in ERISA §203(a)(2), not through regulation of the mode of computing the benefit to which such vesting should apply.

Far more pertinent here are the Court's observations, as to the definition of "nonforfeitable" in §3(19), that "the principal subject of the definition is the word 'claim;' it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan,'" 446 U.S. at 371. Obviously, the "claim" cannot exist without the "benefit," and the mode of determining the structure of the benefit is essentially unregulated by ERISA.

Equally pertinent is the Court's further observation, regarding the definition of "forfeiture" as used in §203(a), that:

> "Third, the term 'forfeiture' normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in §203 (a)(3) see n. 10, *supra,* describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of 'non-forfeitable' to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect." 446 U.S. at 372-73

Although the "limit" on the benefit amount receivable to which the Court referred in *Nachman* was the limit imposed by the adequacy of plan assets, the Court's reasoning is no less applicable to a limit imposed by the structure of the benefit under the plan. Indeed, since the "limit" imposed by the computation of the benefit under the plan operates even before the promise of a right to a benefit arises, and defines that as to which the promise applies, it surely cannot constitute a forfeiture within the meaning of §203(a).

The Sixth Circuit majority in *Utility Workers, supra,* fail to recognize the basic distinction between the two concepts in its preoccupation with what they deem "excessive attention to the phrase 'under the plan'" in ERISA

§3(19).[16] Thus, the *Utility Workers* majority are concerned that if they were to follow the express statutory distinction between benefit structure, on the one hand, and nonforfeitability, on the other, "a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures" (Slip Opin. 7). They correctly recognize, in the next sentence of their opinion, that this result "would be contrary both to the provisions and to the spirit of ERISA" (*ibid.*); however, they mistake the reason this result cannot obtain under ERISA. Their confusion of statutory concepts is demonstrated by the citation of *Keller* v. *Graphic Systems of Akron, Inc., Employees Profitsharing Plan,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976), for the proposition that §203(a) of ERISA prohibits the denial of a pension by reason of the employee's post-retirement violation of a covenant against competition.[17] It is undoubted that this result is correct. However, it is so because the denial of the pension relates solely to the claim of right to the pension—vesting—and not to the determination of the accrued benefit to which vesting applies.[18] The result, therefore, does not require—nor can

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[16] Slip Opin. 7, citing the opinion of the district court therein, 453 F.Supp. at 452 n. 8.

[17] The enunciation of the principle therein was by way of *dictum,* the court having held §203(a) inapplicable, as the termination of employment occurred prior to its effective date (see n. 1, *supra*).

[18] Thus, petitioners' citation of other post-retirement employment cases such as *Amory* v. *Boyden Associates,* 434 F.Supp. 671 (S.D. N.Y. 1976), *Lewis* v. *Merrill, Lynch, Pierce, Fenner & Smith,* 431 F.Supp. 271 (E.D. Pa. 1977), and *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), *on remand,* 452 F.Supp. 117 (S.D. N.Y. 1978), *aff'd,* 586 F.2d 968 (2d Cir. 1978) (which involve the loss of a pension for employment in the same industry), and such "bad boy" clause cases as *Winer* v. *Edison Bros. Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979), and *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979), is inapposite. Further, as discussed more fully at pp. 30-31 and n. 42 *infra,* the limitation upon offsets which may be taken into account in the "benefit under the plan" to statutory benefits, precludes any abuse by the plan sponsor, contrary to the concern of the *Utility Workers* majority and petitioners.

it justify—reading ERISA §3(19) as though it omitted a fundamental and significant phrase.

Thus, the express statutory language demonstrates the intent of Congress that §203(a) of ERISA only protect against loss of the normal retirement benefit as defined by the plan, not (as petitioners contend) that it regulate the structure and computation of that benefit. This, by itself, defeats petitioners' argument.

B. The statutory antecedents and legislative history of ERISA demonstrate the intent of Congress to continue to permit full pre-ERISA benefit integration that includes workers' compensation benefits.

That this general intent applies specifically to the integration of pension plan benefits with other statutory benefits is reflected even more clearly in the background and legislative history of ERISA. As the Third Circuit recognized below, the obvious flaw in petitioners' contention that workers' compensation benefit integration is prohibited by §203(a) because it is not expressly excepted in §203(a)(3) is that the same argument is equally applicable to the more familiar social security benefit integration, also nowhere referred to in §203(a). Yet it is clear that social security benefit integration—which may also be applied through a direct offset to benefits—has survived the enactment of ERISA. ERISA §206(b), and its companion Code provision, §401(a)(15), both provide that the benefits of a participant or beneficiary who is receiving benefits under a pension plan or who was separated from service with nonforfeitable rights to benefits may not be decreased by reason of any subsequent increase in the benefit levels payable or the wage base under Title II of the Social Security Act. ERISA §206(b) provides as well for Railroad Retirement Act benefit integration.[19] It is thus beyond question that ERISA con-

[19] A fact apparently overlooked by the majority in *Utility Workers, supra* (Slip Opin. 8), as well as by petitioners and appellants. Petitioners fail even to cite ERISA §206(b).

templates continuation of integration of benefits under the Social Security and Railroad Retirement Acts. Yet that would be prohibited under petitioners' construction of §203(a). Petitioners' construction of §203(a), therefore, cannot be valid.

Petitioners and appellants in *Alessi* seek support from the very reference to social security benefit integration in ERISA §206(b) and Code §401(a)(15), erroneously considering Code §401(a)(15) the source of authority for social security benefit integration.[20] Indeed, this is the very trap into which the majority in *Utility Workers* fall.[21] Misconceiving Code §401(a)(15) as the true source of statutory authority for social security benefit integration, they reason that as §401(a)(15) refers *only* to social security benefits and not as well to other, *e.g.*, workers' compensation, benefits, it evidences an intention on the part of Congress to limit offsets or reductions of vested pension plan benefits to those for social security benefits or—presumably through an implied application of the principle of *eiusdem generis*—"offsets that are comparable to an offset for a social security payment" (*Utility Workers,* Slip Opin. 8). Thus, the majority view the case as presenting a choice between whether "the workers' compensation offset . . . [is] in the nature of an offset for social security payments—an offset that Congress implicitly sanctioned in the provisions of ERISA—or . . . a forfeiture that is prohibited by the broad non-forfeit-

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[20] *E.g.*, Brief of Petitioners 26; Brief of Appellants 41 n. 34.

[21] As did the district court whose decision it affirmed, taking with it the subsequent courts which adopted its reasoning, including the district court below, *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D. Wis. 1980), *appeal pending,* No. 80-1755 (7th Cir.); presumably, *Server* v. *Interpace Corp., appeal pending,* No. 79-3832 (9th Cir.), from a district court decision without opinion; and *Employee Benefits Committee, etc., of Hawaiian Telephone Co.* v. *Pascoe,* Civil No. 78-0483 (D. Hawaii Dec. 15, 1980), which totally misconstrues the Third Circuit's reference herein to Code §401(a)(15).

ability language of section 203(a)" (Slip Opin. 9). Their entire opinion must, therefore, stand or fall on the *a priori* assumption that the source of congressional approval of social security integration lies in Code §401(a)(15). Yet it is apparent that Code §401(a)(15) merely limits, in certain cases,[22] social security benefit integration independently existing and sanctioned elsewhere—specifically, in Code §401(a)(5), 26 U.S.C. §401(a)(5), which long antedates the enactment of ERISA,[23] but is nowhere cited directly in the Sixth Circuit opinion.[24]

Herein lies the key to the correct analysis of what Congress did and did not do in its enactment of ERISA and the demonstration of the fundamental error in the *Utility Workers* decision and the argument of petitioners herein. Petitioners (and, as well, appellants in *Alessi* and their *amici*) and the *Utility Workers* majority would have this Court treat Congress as though it were, in the enactment of ERISA, writing on a clean slate. Manifestly, it was not. ERISA is by no means the first undertaking of Congress to regulate the private pension system. The House Ways and Means Committee recognized this when it stated that:

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[22] In so doing, Code §401(a)(15) and ERISA §206(b) essentially codified pre-ERISA law as construed by the Internal Revenue Service. See H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 29 (1974), II Legislative History of the Employee Retirement Income Security Act of 1974, at 3421, 3449 (S. Comm. on Labor and Public Welfare, Subcomm. on Labor, 1976) hereinafter referred to as "Leg. Hist.").

[23] The proposal to suspend integration cited in the Brief of *Amicus Curiae* Gray Panthers 25-26, embodied in H.R. 2, §1021(g), as reported in H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 131 (1974), III Leg. Hist., at 4405, was deleted by H. Con. Res. 609, §17, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4722, and never enacted. Obviously, the minority views cited do not reflect the intention of Congress.

[24] The only reference to Code §401(a)(5) is through the citation (Slip Opin. 14) of Rev. Rul. 68-243, 1968-1 C.B. 157, which cites §401(a)(5).

> "Essentially, your committee's bill represents a significant improvement in the tax treatment now applicable with respect to qualified retirement plans. Your committee regards the present legislation as part of an evolutionary process which keeps this basic framework but which builds on it new provisions which experience indicates are necessary for the proper functioning of these plans." H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 8 (1974), II Leg. Hist., at 3128.

Therefore, to ascertain the intention of Congress in ERISA, one must look to the antecedent history of Congressional regulation of the private pension system. That history, insofar as it relates to benefit integration, goes back to 1942, when Congress enacted §165(a)(4) and (5) of the Internal Revenue Code of 1939, recodified as §401(a)(4) and (5) of the Internal Revenue Code of 1954, 26 U.S.C. §401(a)(4) and (5), without essential change.[25]

Section 401(a)(5) essentially builds upon §401(a)(4), which precludes a pension plan from being qualified under the Code if the contributions or benefits provided thereunder "discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." Section 401(a)(5) provides—since the enactment of ERISA as before—that a plan will not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan "differ because of any retirement benefits created under State or Federal law."

The phrase "retirement benefits created under State or Federal law" is not further defined by statute. In 1968, however, the Internal Revenue Service issued Rev. Rul. 68-243, 1968-1 C.B. 157, holding, by way of defining and applying the phrase, that "the benefits payable under a workmen's compensation law or occupational diseases law . . . are acceptable as an offset against benefits payable

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[25] Revenue Act of 1942, P.L. 753, 56 Stat. 798, §162.

under [a] qualified pension plan." The Service subsequently incorporated Rev. Rul. 68-243 in substance into its "Guides for Qualification of Pension, Profit Sharing, and Stock Bonus Plans" in Rev. Rul. 69-421, Part 4(j)(4), 1969-2 C.B. 59, 72, in the following terms:

> "Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. See Rev. Rul. 68-243, C.B. 1968-1, 157." Emphasis added.

This provision was included without change in the February, 1972, edition of the "Guides for Qualification of Pension, Profit Sharing and Stock Bonus Plans," IRS Publication 778, Part 4(j)(4), p. 15 (2-72).[26]

Title II of ERISA contains numerous amendments to §401 *et seq.* of the Code, including the addition of Code §411—the direct parallel of ERISA §203 in Title I—and the addition of two new sentences to IRC §401(a)(5) not relevant here.[27] There has been no relevant change in the statutory provision under which Rev. Rul. 68-243 was issued and twice republished, and its holding, therefore, remains unaffected by the enactment of ERISA.[28]

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[26] Reproduced in BNA Tax Management Portfolio No. 351, p. B-1401 at B-1415 (1979).

[27] The added material deals with problems of benefit integration involving two or more plans of the same employer.

[28] That Rev. Rul. 68-243 continues to be given effect since the enactment of ERISA is seen in Rev. Rul. 78-178, 1978-1 C.B. 117, where the Internal Revenue Service reaffirmed its holding therein. See p. 25, *infra*.

This Court stated in *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938), that:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

To the same effect, *see NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Commissioner* v. *Noel*, 380 U.S. 678, 681-82 (1965).

Petitioners attempt to denigrate Rev. Rul. 68-243 as merely the opinion of a single attorney within the Internal Revenue Service that is entitled to little regard.[29] However, the deference to be accorded administrative interpretations of a statute by the agency chosen to enforce it is not confined to a formally promulgated regulation, but is equally applicable to a published Revenue Ruling, which represents "an official interpretation by the Service," 26 C.F.R. §601.201(a)(6) (1980). *E.g., United States* v. *Leslie Salt Co.*, 350 U.S. 383, 389-96 (1956). Such deference has been extended fully to the principle of "express and implied congressional acquiescence . . . through Congress having let the administrative interpretation remain undisturbed," despite amendment of the statute. *United States* v. *Leslie Salt Co., supra*, 350 U.S. at 396-97.

In any event, the incorporation of the holding of Rev. Rul. 68-243 into Rev. Rul. 69-421 and IRS Publication 778 (2-72), *supra*, constitutes it a fundamental and integral part of the comprehensive "Guides for Qualification of Pension, Profit Sharing, and Stock Bonus Plans that governed private pension plans in the United States at the time of enactment of ERISA and were then known to Con-

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[29] Brief of Petitioners 28; Brief of Appellants 29. Contrary to appellants' suggestion (Brief of Appellants 31), Rev. Rul. 68-243 is a "formal published ruling."

gress.[30] Accordingly, the failure of Congress to take affirmative action in ERISA to prohibit the offsets authorized therein is appropriately viewed as sanctioning such offsets.[31]

However, it is not necessary to rely solely upon a negative inference from the reenactment of Code §401(a)(5) in ERISA without change. Congress has made its intention admirably clear in the Conference Committee Report accompanying the bill enacted as ERISA, in stating that:

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[30] Congress' familiarity with IRS Publication 778 in its enactment of ERISA is shown by its citation thereof, in an unrelated context, in S. Rep. No. 93-383, 93d Cong., 1st Sess., at 94 (1973), I Leg. Hist., at 1162, a fact of which the majority in *Utility Workers* were apparently unaware, judging from the absence of any reference thereto while citing Rev. Rul. 68-243 and Rev. Rul. 69-421, *supra*.

[31] Particularly since workers' compensation benefit integration is included in the pension plans of the steel industry (see Brief of Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard, Shenango Inc., United States Steel Corporation, and Wheeling-Pittsburgh Steel Corporation as *Amicus Curiae* in the Third Circuit and the like brief *Amicus Curiae* leave to file which has been sought herein on behalf of the steel industry) as well as those of the motor vehicle manufacturing industry.

To suggest, as the *Alessi* appellants do (Brief of Appellants 19-20 n. 15), that the less common occurrence of the workers' compensation offset perceived by the Report of Hay Associates cited therein (which expressly denies that its views necessarily represent the views of the U.S. Department of Labor), despite its presence in plans in the important steel and automotive industries, is responsible for the absence of any express reference thereto in ERISA is to prove too much, at least for their argument. If anything, it leads to the conclusion that Congress did not view that offset as a source of concern and, therefore, did not take any action to prohibit its employment in pension plans, rather than (as petitioners and appellants would have it) that Congress should be deemed to have prohibited a practice of which they had no expressed concern.

> "Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 277 (1974), III Leg. Hist., at 4544.

That this expression of congressional intent relates directly to the nonforfeiture provisions of ERISA §203 may be seen in the fact that it is found in a discussion of "the relationship of the minimum vesting standards of the bill to the antidiscrimination rules of present law (sec. 401 (a)(4) of the Internal Revenue Code)." *Id.*, at 277, III Leg. Hist., at 4543. Thus, the provisions of §203(a) relating to vesting and nonforfeitability cannot be read except in context with the preexisting and continuing antidiscrimination rules evolved under the long pre-ERISA history of Code §401(a)(4) and (5), which include the approval of workers' compensation benefit integration.[32]

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[32] The *Utility Workers* majority's unawareness of this undeniable fact is clear from their closing statement at Slip Opin. 13, which betrays throughout a lack of understanding of the history and structure of pension plan regulation prior to ERISA and since, upon which ERISA itself is premised (matched by *Alessi* appellants' reference to taking Code §401(a)(5) into account in construing ERISA §203(a) as a "wholesale addition to the statute" (Brief of Appellants 31)). It is remarkably similar to that of the district court in *Utility Workers, in* 453 F.Supp. at 455 n. 11, addressed to 26 C.F.R. §1.411(a)-4(a), which followed, rather than preceded, enactment of ERISA, thus making the court's observation a complete *non sequitur.*

The majority allude to some other basis for their determination to disregard the thrice-promulgated pre-ERISA approvals of

(Footnote continued on following page)

A contrary view of the relationship of Code §401(a)(4) and (5) to ERISA §203 and Code §411 requires attributing to Congress an intent to effect an implied partial repeal of Code §401(a)(5) by ERISA §203 and Code §411.[33] If an implied repeal of an earlier statute by a later one is not to be assumed, *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), the implied repeal by one part of a statute of a provision separately reenacted in the same statute must certainly be rejected.

If further demonstration were needed that the concepts of "forfeiture" and integration "offset," on the absolute identity of which petitioners' argument and the majority conclusion in *Utility Workers* depend, are distinct and mu-

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(Footnote continued from preceding page)

workers' compensation benefit integration. However, their opinion gives no further inkling of any other basis therefor. The only possible conclusion, therefore, is that the *Utility Workers* majority denied these Treasury interpretations the dispositive sanction of congressional approval only because they were unaware that Congress had reaffirmed pre-ERISA antidiscrimination rules while adopting the minimum vesting provisions of ERISA §203(a) and Code §411(a).

[33] Further, ERISA §302(c)(4)(A), 29 U.S.C. §1082(c)(4)(A), and its Code counterpart, §412(c)(4)(A), in providing for minimum funding taking into account changes in "retirement benefits created under Federal or State law," point up the fact that pension plans that integrate workers' compensation benefits have necessarily been funded on the assumption of such integration. To undo such integration retroactively to the first plan year beginning on or after January 1, 1976 (see n. 1, *supra*), could have a significant deleterious impact upon the funding of such plans, possibly threatening the stability and continued existence of such plans. This was recognized by the dissenting judge in *Utility Workers, supra* (Slip Opin. 22), consistently with the observations of this Court in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-47 (1978), in a not dissimilar context.

tually inconsistent,[34] it is found in the fact that the concept of "nonforfeitability" was introduced for the first time not in ERISA, but in Code §401(a)(7), enacted in 1962.[35] As enacted, §401(a)(7) required that, to be qualified, a pension plan must provide that "upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable." This was changed by ERISA to a simple requirement that the plan, upon termination, meet the requirements of Code §411, the counterpart of ERISA §203. This demonstrates that, although the rules relating to forfeitures were codified and modified by ERISA, the concept of nonforfeitability long antedated ERISA and subsisted side by side with Code §401(a)(5), long construed as approving the very workers' compensation offsets in issue here.[36]

It is thus clear from the reenactment of pre-ERISA Code provisions, the new enactment of complementary ERISA provisions, and the expressed intent of Congress that Congress deliberately intended to import into ERISA and continue in effect the pre-existing rules sanctioning plan benefit integration, including the thrice promulgated approval of workers' compensation benefit integration that formed

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[34] Contrary to the assertion in Brief of *Amicus Curiae* Gray Panthers 21. Nor does the Treasury's proposal of new vesting regulations in 45 Fed. Reg. 24201 (Apr. 19, 1980), cited therein, signify otherwise; the proposed regulations merely reflect the minimum vesting standards newly added by ERISA §203(a)(2).

[35] Code §401(a)(7) was enacted as part of the Self-Employed Individuals Tax Retirement Act of 1962, P.L. 87-792, 76 Stat. 809, §2, but is of general applicability to all pension plans.

[36] It should be noted that the GM Pension Plan provision here in issue itself antedated the enactment of ERISA, the current version thereof going back to 1970, while maintaining its qualified status under Code §401 *et seq.*

an integral part of pension plan structure for at least six years before ERISA and has received continuing Treasury endorsement for more than six years since ERISA.

C. The Treasury Department's adoption of 26 C.F.R. §1.411(a)-4(a) confirms the continued validity of workers' compensation benefit integration.

It is within the statutory framework discussed in the preceding section of this brief that the administrative construction of §203 of ERISA and its complementary and interrelated Code provisions both pre- and post-ERISA, must be considered. In 1977, the Treasury Department, in T.D. 7501, 42 Fed. Reg. 42326 (1977), promulgated Treas. Reg. 26 C.F.R. §1.411(a)-4(a) (1980), which provides that:

> "[N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits."

It is unmistakable that the Treasury Department intended, by its adoption of 26 C.F.R. §1.411(a)-4(a), to incorporate into the structure of ERISA §203 and Code §411 the basic concepts of benefit integration under which the offset of workers' compensation benefits against pension plan benefits under defined benefit pension plans has been upheld since at least 1968. Indeed, the Internal Revenue Service contemporaneously reaffirmed Rev. Rul. 68-243 in Rev. Rul. 78-178, 1978-1 C.B. 117, in distinguishing unemployment compensation benefits, which may not be offset against pension plan benefits, from workers' compensation benefits, which may be offset.[37]

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[37] Thus, it is simply internally inconsistent for the *Utility Workers* majority to suggest, as they do, that one may accept the Treasury regulation as valid and effective while at the same time rejecting the foundation on which it was built and which comprehends within it workers' compensation benefit integration.

That the Treasury Department has ample authority to promulgate regulations in this area applicable not only to Code §411 but also to ERISA §203 is clear: ERISA §3002 (c), 29 U.S.C. §1202(c), expressly provides that regulations prescribed by the Secretary of the Treasury under Code §411 shall also apply to the resulting standards set forth in ERISA §203 and expressly prohibits the Secretary of Labor from prescribing regulations or interpreting and applying §203 in a manner inconsistent with the way such regulations apply under §411.[38] Citing this Court's decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977), and its own prior decision in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), the Third Circuit held below that 26 C.F.R. §1.411(a)-4(a) is a "legislative regulation" and that in order to sustain such a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole" (J.A.100a, quoting 609 F.2d at 692).[39]

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[38] This preclusion of the Secretary of Labor is reflected in the Department of Labor's own regulations under ERISA in 29 C.F.R. §2530.200a-2 (1980). It has also been confirmed in Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713, §101(c) (Oct. 18, 1978), which also removes from the Secretary of Labor and vests in the Secretary of the Treasury all regulatory, ruling, and opinion functions under §3(19) of ERISA, 29 U.S.C. §1002(19), *i.e.*, the definition of "nonforfeitable."

[39] This analysis was subsequently adopted by the Sixth Circuit as to a companion regulation in *General Motors Corporation* v. *Buha*, 623 F.2d 455, 462-63 (6th Cir. 1980), and, indeed, is reaffirmed in its *Utility Workers* decision (Slip Opin. 12-13). Petitioners (and, at even greater length, appellants in *Alessi*) contend that the Third Circuit erred in classifying 26 C.F.R. §1.411 (a)-4(a) as a legislative regulation, because Congress did not make an express delegation therein of the authority to define and prescribe standards (Brief of Petitioners 26-27; Brief of Appellants 23-28). However, the delegation of authority in ERISA §3002(c) is not significantly different from that in some of the other sta-

(Footnote continued on following page)

Whether 26 C.F.R. §1.411(a)-4(a) be deemed legislative or merely interpretative, this Court has repeatedly held "that Treasury regulations must be sustained unless unreasonably and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Bingler* v. *Johnson*, 394 U.S. 741, 750 (1969). This has been considered particularly apt where, as here, the regulation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts works efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *see also Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). To sustain a regulation, this Court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). That 26 C.F.R. §1.411(a)-4(a) meets this test must follow from an examination of the statutory and legislative history detailed above.

The regulation commands even greater deference in weight when read in concert with the regulations of the Pension Benefit Guaranty Corporation, the agency established within the Department of Labor under Title IV of ERISA for the purpose, *inter alia*, of providing "for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this

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(Footnote continued from preceding page)

tutory provisions treated by the Court in *Batterton* v. *Francis*, 432 U.S. 416, 425-26 and n. 9 (1977), as giving rise to legislative regulations. Appellants further confuse formally promulgated Treasury regulations, to which ERISA §3002(c) relates, with Internal Revenue Service administrative determinations in individual cases, which ERISA made subject to judicial review in Code §7476, 26 U.S.C. §7476 (Brief of Appellants 26). Obviously, one bears no relation to the other.

title applies." ERISA §4002(a), 29 U.S.C. §1302(a). The PBGC is required by §4022(a) of ERISA, 29 U.S.C. §1322(a), to "guarantee the payment of all nonforfeitable benefits . . . under the terms of a plan which terminates at a time when section 4021 applies to it." The PBGC regulations provide in 29 C.F.R. §2604.3 (1980) that the PBGC will guarantee the amount of a benefit only if the participant is entitled to the benefit under 29 C.F.R. §2605.5 (1980) and the benefit qualifies as a pension benefit defined in 29 C.F.R. §2605.2 (1980) and is nonforfeitable under 29 C.F.R. §2605.6 (1980). The term "pension benefit" is defined in 29 C.F.R. §2605.2 (1980) as meaning "a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently left covered employment, or to a surviving beneficiary, which payments by themselves *or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient*" (emphasis added).

Thus, the regulations of the PBGC, to which this Court gave deference and weight in *Nachman, supra,* recognize expressly that a pension benefit may be nonforfeitable under ERISA even though subject to integration with workers' compensation benefits. This concurrence of the PBGC[40] and the Treasury Department in the promulgation of their respective regulations under ERISA provides strong, if not dispositive, support for the continued vitality of workers' compensation benefit integration.

In sum, 26 C.F.R. §1.411(a)-4(a) cannot exist in a vacuum, separated from the statutory, regulatory, and administrative history that preceded it and preceded the enactment of ERISA, as much as the panel majority in *Utility Workers* may wish it so. When read together, all the parts fall into place and operate with internal consistency with and within the structure and scheme of ERISA.

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[40] And the Secretaries of Labor, Commerce, and the Treasury who comprise its Board of Directors. ERISA §4002(d), 29 U.S.C. §1302(d).

D. Integration of workers' compensation benefits is rational, appropriate, and consistent with law.

The foregoing is, as the Third Circuit recognized, dispositive of the issue. Realizing this, petitioners and appellants in *Alessi* turn their attack upon the policy considerations inherent in workers' compensation benefit integration—much as the *Utility Workers* majority do through the medium of attempting to analyze whether workers' compensation benefits and social security benefits are "like" benefits, continuing to operate under the misconception that Code §401(a)(15) is the source of benefit integration authority and, as such, is limited to social security benefits.

The *Utility Workers* majority mount their attack on the comparability of social security and workers' compensation benefits from several directions. First, they attack a test of comparability that is predicated solely upon the fact that both types of benefits are employer-funded. Yet employer financing clearly lies at the heart of the concept of integration.[41]

The majority next question the premise of Rev. Rul. 68-243 that the workers' compensation system, like the social security program, "makes benefits available to the general public." Surely, the fact that an employee must sustain a disability within the course of his employment does not detract from the fact that all employees are members of the system that affords such benefits when the proper conditions of eligibility therefor have been met. Indeed, the same observation could be made with respect to social security benefits, which include disability benefits conditioned upon occurrence of a statutorily suf-

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[41] This is perhaps best seen in the integration of social security and pension benefits in a defined contribution pension plan that benefits self-employed individuals, in which integration is accomplished through a direct reduction in contributions, and, therefore, benefits, by the amount of the employer's share of the social security tax. *See* Treas. Reg. 26 C.F.R. §1.401-12(h)(3)(ii) (1980).

ficient degree of disability. In each case, attainment of eligibility for receipt of benefits does not alter the fact that the benefits are available, at the outset, to all who will become eligible.

The *Utility Workers* majority seize upon what they refer to as a "source of entitlement" test, seeking justification for it in the fact that ERISA §3(19) defines "nonforfeitable" in terms of its reference to the "benefit under a pension plan which arises from the participant's service," emphasizing the last clause (Slip Opin. 17-18). However, that clause certainly cannot have the meaning they would attribute to it, since all benefits under a pension plan—indeed, all employment-related benefits—have their "source of entitlement" in service with the employer, whether or not the benefit is measured by the length of service. There is no other source.

A more rational and statutorily sound basis on which to determine the appropriateness of integration of a particular type of statutory benefit[42] with benefits available under a pension plan is whether the benefits together form part of "an integrated and correlated retirement system." Treas. Reg. 26 C.F.R. §1.401-4(b). Thus, as Rev. Rul. 78-178, 1978-1 C.B. 117, provides, unemployment compensation benefits and "benefits payable under State or Federal programs because of sickness and maternity and which include cash benefits and medical services" may not be integrated with pension plan benefits because they are benefits of a

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[42] Both Code §401(a)(5) and 26 C.F.R. §1.411(a)-4(a) limit integration to benefits provided by statute; thus, an employer may not integrate plan benefits with other, nonstatutory, sources of wage replacement, such as the private insurance proceeds or wages from another employer to which the *Utility Workers* majority point in an attempted *reductio ad absurdum* (Slip Opin. 17), thus refuting the "Pandora's box" fears expressed by petitioners and appellants.

type which may not be provided under a pension plan. *See* Treas. Reg. 26 C.F.R. §1.401-1(b)(1)(i) (1980).[43]

On the other hand, a pension plan may and customarily does provide benefits upon retirement for disability as well as retirement for age, and for work-related disabilities as well as those not so related. Social security disability benefits and benefits provided by a workers' compensation statute fulfill a like function. Indeed, the existence of a direct relationship between workers' compensation benefits and pension plan benefits is readily demonstrated by the existence of a direct relationship between workers' compensation benefits and social security benefits, the relation of which to pension plan benefits is conceded by all.[44] Congress has expressly provided, in §224 of the Social Security Act, 42 U.S.C. §424a, for the deduction from social security disability benefits of benefits "under a

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[43] The lengthy attempt by appellants in *Alessi* (Brief of Appellants 35-38) to deride the regulations and rulings of the Treasury Department and the Internal Revenue Service on the basis of their supposed ignorance of workers' compensation principles is particularly misguided as to the Service's distinction between workers' compensation benefits and sickness benefits. 26 C.F.R. §1.401-1(b)(1)(i) expressly precludes providing in a pension plan for such uncustomary benefits as "layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses," except to the limited and subordinate extent permitted in Code §401(h), 26 U.S.C. §401(h). The distinction lies not in the source of the disability but in the nature of the benefits; *i.e.*, benefits to replace out-of-pocket expenditures, whether caused by sickness or accident, may not be provided or offset, while other disability benefits may be both provided and offset, whether arising from sickness or accident. As in the case of the distinction between workers' compensation benefits and common-law tort damages (see n. 45, *infra*), the distinction is one that is entirely rational in the statutory framework.

[44] The mere fact (cited in Brief of Appellants 33 n. 27) that workers' compensation benefits are excluded from taxable income, while pension benefits are taxable, cannot be of significance, as social security benefits are equally free from tax but nevertheless may be integrated with pension benefits.

workmen's compensation law or plan of the United States or a State."[45]

The linkage of benefits for age and benefits for disability in the sytem of federal old age, survivors, and disability benefits ("OASDI") under the Social Security Act points up a basic but significant fact: that "retirement" applies to a broad continuum of benefits, the payment of which may be triggered by a variety of acts or events, more or less inevitable, voluntary, or work-related. Whether the qualifying event be age, death, disability (work-connected or not), or merely severance of the employment relation by reason of none of the foregoing,[46] a resulting benefit is deemed a "retirement" benefit under a pension plan.

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[45] Petitioners and appellants attack the distinction drawn in Rev. Rul. 68-243 between statutory workers' compensation benefits, which may be deducted from pension plan benefits, and damages recovered against the employer in an action at common law, which may not be deducted, contending that as the statutory remedy is historically merely a substitute for the common-law right of action, any distinction between the two is erroneous. Yet, such a distinction is not peculiar to the Treasury Department. The same distinction was made in 42 U.S.C. §424a, and the same contention made here by petitioners and appellants was raised thereunder and rejected in *Richardson* v. *Belcher*, 404 U.S. 78 (1971). The limitation of the 42 U.S.C. §424a offset to disability benefits reflects this legislative history. *See Lofty* v. *Richardson*, 440 F.2d 1144, 1151-52 (6th Cir. 1971), *cert. denied*, 404 U.S. 985 (1971). As it does not affect the normal retirement benefits involved herein and to which §203(a) of ERISA is limited, the inaccurate suggestion by *amicus curiae* Gray Panthers of a possible "double offset" is not relevant. That this offset is expressly provided by statute does not detract from the validity of a workers' compensation offset not the subject of a similar express statutory provision, since social security benefits, being a creature of statute, are necessarily subject to reduction only by express statutory provision, unlike private pension plan benefits, the adoption and structure of which are voluntary.

[46] The circumstances under which a severance pay plan may be deemed a retirement benefit plan—a term most broadly defined in ERISA §3(2), 29 U.S.C. §1002(2)—are set forth in DOL Reg. 29 C.F.R. §2510.3-2 (1980).

Herein lies the answer to the varied, strained, and tortuous arguments the *Utility Workers* majority invoke to support their ultimate holding—a holding dictated, as their conclusion shows, by a concern with the two hypothetical employees who leave employment after earning comparable wages and completing comparable years of service, one with a work-related disability for which he receives a workers' compensation award and the other without disability. That the two should receive comparable benefits, taken in the aggregate, strikes the majority as unfair. Yet that is the position in which a similarly disabled retiree could find himself if his disability were not compensable under a workers' compensation law. The assumption inherent throughout the majority opinion in *Utility Workers* is that somehow the employer is at fault and should be penalized where the disability is work-related. However, it is clear beyond dispute that workers' compensation is a form of employer-financed social insurance entirely unrelated to employer fault.[47] Hence, the assumption and the arguments devised to support it must fail.

In the final analysis, the rationality of the principle of integration of private pension plan benefits and workers' compensation benefits lies in the fact that such integration constitutes a logical and integral part of an overall system of wage-loss protection and wage replacement as much as the obviously older and more universal system of benefits under the Social Security Act. *See* 4 A. Larson, *The Law of Workmen's Compensation*, c. XVIII, esp. at §§96.20 and 97.10 *et seq.* (1979 ed.)[48]

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[47] *See* A. Larson, "Basic Concepts & Objectives of Workmen's Compensation," 1 *Supplemental Studies of National Commission on State Workmen's Compensation* 31 at 32 (1973).

[48] "97.10 *Impropriety of duplicate benefits*

"Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to

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Like social security and railroad retirement benefits, workers' compensation benefits are employer-financed—indeed, entirely so, in contrast to social security benefits, which are partially employee-financed[49]—and payable without regard to employer fault. All three classes of benefits are intended to alleviate and replace loss of income when active wages cease. Petitioners and appellants concede that where the employer has already replaced an employee's loss of income through a pension—whether for age or disability retirement—the employer is entitled to claim an offset for social security or railroad retirement benefits he has helped provide through his financing. Logic —not to mention the law as consistently construed and applied by the Treasury Department—permits no differ-

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> the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits." 4 A. Larson, *The Law of Workmen's Compensation*, §97.10 (1979 ed.)

The same conclusion was reached in the *Report of the National Commission on State Workmen's Compensation Laws*, at 66 (1972), pursuant to §27 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §676.

[49] *See* Code §3101 *et seq.*, 26 U.S.C. §3101 *et seq.* (the Federal Insurance Contributions Act), and Code §3201, 26 U.S.C. §3201 *et seq.* (the Railroad Retirement Tax Act).

ent treatment for the third class of employer-financed benefits, workers' compensation benefits.[50] When received for a disability commencing (or extending) after retirement for age (whether at normal retirement age or prior thereto), workers' compensation benefits fulfill the same basic function as social security, railroad retirement, and pension benefits, namely, providing post-retirement income to replace pre-retirement wages. That the mode of providing workers' compensation benefits may differ from jurisdiction to jurisdiction is not relevant. Whether such benefits be provided by a state-operated insurance fund to which all employers must contribute, by state-mandated private insurance, or by self-insurance permitted as an alternative to either, the only relevant fact is the same: that the benefits paid are state-mandated and financed by the same employer who pays the pension that has already replaced the wages of the benefit recipient.

The validity of the concept of integration of pension plan retirement benefits with workers' compensation benefits is nowhere better expressed than in *Renshaw* v. *U.S. Pipe & Foundry Co.*, 30 N.J. 458, 153 A.2d 673 (1959), where the Supreme Court of New Jersey[51] upheld the offset of workers' compensation benefits against a pension

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[50] That workers' compensation benefits may include benefits not clearly or directly related to wage loss—such as reimbursement for medical expenses and statutory awards for the loss of a member—affords no basis for distinction. Medical expense benefits are expressly excluded from integration, see Rev. Rul. 78-178, *supra*, and p. 31, *supra*. Statutory awards, excluded in the facts of Rev. Rul. 68-243, are not properly an exception to the wage-replacement nature of workers' compensation. *See* Larson, *op. cit.*, *supra*, n. 47, at 33. In any event, neither type of benefit is included in the GM Pension Plan integration formula.

[51] Quoting the observations of Professor Larson set forth in n. 48, *supra*, and concurring generally in his approval of the concept of nonduplication of wage-loss benefits.

plan normal retirement benefit, both payable to an employee following his retirement at age 65, under a provision similar to Section 2 of Article IV of the GM Pension Plan, the court stating:

> "What the plan actually amounted to, and no more, was a commitment by the company to see that each retired employee received a fixed amount of money monthly, to compensate partially for wages lost through inability to continue employment by reason of age, and that if such was not forthcoming in whole or in part from the specified sources, *i.e.*, public pension, other pension contributed to by the company, social security benefits, private or statutory severance pay and the like, workmen's compensation benefits from the company or any other employer or public disability pension, it would pay the computed amount or any deficiency. The scheme had no particular relation to compensation benefits. Its scope was much broader and the theory an infinitely deeper one.
>
> "Moreover, it was no unilateral or gratuitous undertaking, but an agreement collectively bargained for and reached between the employer and the exclusive agent of the employees as part of a basic labor contract. . . .
>
> "We see no public policy question involved, and so no violation thereof, in any such design of a private, contractual pension plan or the particular provision before us. Plaintiff's position would seem to be equally assertive against decrease in the pension by the amount of social security payments or any of the other specified deductions. We find nothing to warrant concluding that workmen's compensation payments should be in any different or more insulated category." 30 N.J. at 467-68, 153 A.2d at 678-79.

It is noteworthy that the New Jersey Supreme Court engaged in the same reasoning as the Internal Revenue Service did, almost a decade later, in Rev. Rul. 68-243—reason-

ing since adopted by other courts to which the issue has been presented.[52]

What *Renshaw* makes abundantly clear is that, contrary to the arguments urged upon this Court by petitioners and appellants, there is nothing inherent in the nature of workers' compensation benefits that precludes a private pension plan, including specifically one arrived at through collective bargaining, from taking such benefits into account in determining normal retirement benefits payable under the plan, including the characterization of the workers' compensation benefits either entirely or partially as in the nature of wage replacement. Indeed, the fact that the *Renshaw* court upheld the offset despite its analysis of New Jersey workers' compensation benefits as involving more than wage loss[53] should be sufficient to dispose of the arguments of petitioners and appellants and the allusions of *Utility Workers* on that issue.

In fine, the workers' compensation benefit offset provided for in Article IV, Section 2 of the GM Pension Plan

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[52] *E.g., Soper* v. *St. Regis Paper Co.,* 411 A.2d 1004, 1009-10 (Me. 1980); *Fielder* v. *Travelers Insurance Co.,* 79 Mich. App. 449, 263 N.W. 2d 9 (1977); *Paterson* v. *Southwestern Bell Telephone Co.,* 411 F.Supp. 79 (E.D. Okla. 1976); *Williams* v. *Insurance Co. of North America,* 150 Mont. 292, 434 P. 2d 395 (1968); *Fultz* v. *Union Carbide Corp.,* 219 Tenn. 345, 409 S.W. 2d 541 (1966); *Parsons* v. *Granite City Steel Co.,* 41 Ill. App. 2d 396, 190 N.E. 2d 644, 646-47 (1963). No cases *contra* have been found involving private pension plans. The cases cited in Brief of Petitioners 40-41 n. 4 are inapposite: *City of Lincoln* v. *Steffensmeyer,* 279 N.W. 2d 272 (Neb. 1938), involved construction of a public pension statute; *Lumsden* v. *Despatch Shops, Inc.,* 5 A.D. 2d 242, 171 N.Y.S. 189 (1958), held merely that receipt of a pension did not defeat the employee's right to workers' compensation, an issue entirely different from that here.

[53] The accuracy of the assumption is open to question. *See* Larson, *op. cit. supra,* n. 47, at pp. 33-34. The attempt of New Jersey Legislature to change the policy enunciated in *Renshaw* is, of course, irrelevant to the issue herein, which involves a question of purely federal law that cannot be affected by any change in the law of a single State.

is consistent with the policy underlying workers' compensation as enunciated by the courts in the States in which the question has arisen. It has been an inherent part of permitted and approved private pension plan benefit structure for more than a dozen years. Code §401(a)(5), under which it has been expressly approved, is today as it was prior to ERISA. The permissibility of the offset has been reaffirmed since ERISA. It is fully consistent with the Treasury Department's regulation on the subject, 26 C.F.R. §1.411(a)-4(a). Finally, all of the foregoing are consistent with the structure, statutory antecedents, and legislative history of ERISA. It is respectfully submitted, therefore, that the holding of the Third Circuit below that Article IV, Section 2 of the GM Pension Plan is lawful under §203(a) of ERISA[54] should be affirmed by this Court.

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[54] *Amici curiae* Merl D. Stong, *et al.*, premise their brief on ERISA §403(c)(1), 29 U.S.C. §1103(c)(1), which provides generally that "the assets of a plan shall never inure to the benefit of any employer." This issue was not presented to the Third Circuit, and has not been presented to this Court, by either petitioners or appellants. Therefore, it is not properly raised by these *amici* and should not be considered herein. *Bell* v. *Wolfish*, 441 U.S. 520, 531 n. 13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960). In any event, the origin of ERISA §403(c)(1) lies in 1954 Code §401(a)(2), 26 U.S.C. §401(a)(2) (and, before it, 1939 Code §165(a)(2)). Thus, it is obviously coordinate with and of equal stature to Code §401(a)(5), the source of authority for workers' compensation benefit integration. Thus, if, as respondent submits, such integration is proper thereunder and under ERISA §203(a) and Code §411(a), Congress certainly could not have intended by ERISA §403(c)(1) to prohibit such integration (and, as well, social security and railroad retirement benefit integration which could be deemed equally unlawful under *amici's* reading of ERISA §403(c)(1)). *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, Civ. No. 79-3728 (E.D. Mich. Dec. 11, 1980); *Spitzler* v. *New York Post Corp.*, 476 F.Supp. 386 (S.D.N.Y. 1979). The Third Circuit so recognized in note 13 to its opinion below (J.A.113 n. 13), in response to the issue as raised there by some of these *amici*.

II.

As applied to the GM Pension Plan, N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977, is an invalid attempted exercise of state power in an area expressly preempted by Congress under the Employee Retirement Income Security Act of 1974.

The remaining issue arises by reason of the enactment by the New Jersey Legislature, on July 14, 1977, effective immediately, of Chapter 156 of the Laws of 1977, which amended N.J. Stat. Ann. 34:15-29, part of the New Jersey Workers' Compensation Law, to include a provision that:

> "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

Respondent submits, as it did below, that to the extent Chapter 156 purports to apply to the GM Pension Plan, it represents an invalid attempted exercise of power by the New Jersey Legislature in an area preempted by Congress through the enactment of ERISA and by its express terms, and is, therefore, ineffective under the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, §2.

It is unquestioned that Congress has the power to occupy a field and preempt completely application of State law under the Supremacy Clause. In *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141-42 (1963), this Court summarized the three grounds upon which a state statute will be deemed preempted by Federal law:

(1) if "the Congress has unmistakably so ordained";[55]

(2) if "the nature of the regulated subject matter permits no other conclusion"; or

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[55] To the same effect is *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

(3) if "the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[56]

GM submits that any of the three preemption tests as stated by this Court mandates the conclusion that Chapter 156 has been preempted by ERISA in its application to the GM Pension Plan.

Where applicable, the first test—that of express preemption by Congress—is the most readily applied test. It is applicable here. In the case of ERISA, Congress has "unmistakably ordained" its supremacy in §514(a), 29 U.S.C. §1144(a), which provides that:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975."

That the GM Pension Plan is "an employee benefit plan described in section 4(a)" is clear, since that provision applies to any employee benefit plan established or maintained by any employer engaged in commerce or in any activity affecting commerce. There is no question that GM is such an employer and the GM Pension Plan such a plan.[57] Neither does the GM Pension Plan fall into any of the classes of employee benefit plans "exempt un-

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[56] Citing *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

[57] To the extent that Chapter 156 may have been intended, as the intervenor suggests (Brief of Intervenor 5), to resolve the problems posed by *Conklin* v. *Board of Trustees of Police & Firemen's Retirement System*, 135 N.J. Super. 131, 342 A.2d 872 (App. Div. 1975), *rev'd*, 73 N.J. 198, 373 A.2d 996 (1977), and *Leoni* v. *Township of Hamilton*, 134 N.J. Super. 231, 339 A.2d 222 (App. Div. 1975), preemption by ERISA would leave it unaffected, as those cases relate to governmental pension systems, to which neither ERISA nor its preemptive effect applies.

der section 4(b) of ERISA."[58] The sole inquiry, then, is whether Chapter 156 is a state law that "relates to" the GM Pension Plan.

Once again starting from the literal statutory language, it is difficult to conceive of how Chapter 156 can be said *not* to "relate to" the GM Pension Plan. If permitted to be applied to the GM Pension Plan, it would prohibit the application of Article IV, Section 2 of the GM Pension Plan insofar as it applies to the payment of nondisability retirement pensions to pensioners to whom New Jersey would apply its statute. So viewed, it has a direct impact upon the benefit structure of the GM Pension Plan and thus most intimately "relates to" it.

Although conceding that Congress "must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation," and that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," the district court below declined to hold that Chapter 156 "'relates to' pension plans within the meaning of ERISA, 29 U.S.C. §1144(a)," essentially because it "is in no way concerned with pension plans *qua* pension plans," being "solely concerned with protecting the employee's right to workers' compensation disability benefits" (J.A.65a-66a). Petitioners and appellants essentially adopt that view in their argument to this Court.

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[58] The State of New Jersey, intervening below, contended at the outset that the GM Pension Plan is exempt under §4(b)(3) of ERISA, 29 U.S.C. §1003(b)(3), and, therefore, not affected by §514(a). Section 4(b)(3) excludes an employee benefit plan from the provisions of Title I and, therefore, §514(a), only if "such plan is maintained *solely for the purpose of complying with* applicable workmen's compensation laws or unemployment compensation or disability insurance laws" (emphasis added). Petitioners concede (Brief of Petitioners 44) the inapplicability of this provision to the GM Pension Plan, which is in no wise maintained for the purpose of complying with any such law, let alone *solely* for that purpose.

The Third Circuit saw no difficulty in carrying out what Congress "must have intended." The mere fact that the purposes of the state and federal law may differ is irrelevant in assessing the preemptive effect of federal law. *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra. See also Local 24, International Brotherhood of Teamsters, etc.* v. *Oliver,* 358 U.S. 283, 297 (1959). Nor does the fact that a workers' compensation statute is involved immunize it against preemption. *DeCanas* v. *Bica,* 424 U.S. 35 (1976), cited for its *dictum* by petitioners,[59] was concerned solely with preemption by implication, not, as here, preemption "unmistakably ordained."[60]

Neither does the §4(b)(3) exclusion of plans "maintained solely for the purpose of complying with applicable workmen's compensation laws"—admittedly inapplicable to the GM Pension Plan[61]—show any special deference in the area of preemption. To the contrary, the §4(b)(3) exclusion merely confirms the full subjection to §514(a) of plans *not* excluded by §4(b)(3). Were the intent of Congress otherwise, it would be expressed in a §514(b) exception. In any event, although Chapter 156 amended the New Jersey Workers' Compensation Law, it is clear that it has no direct effect whatsoever upon statutory benefits thereunder; nor is its impact upon private pen-

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[59] Brief of Petitioners 44.

[60] In his opinion for the Court in *De Canas* v. *Bica, supra,* 424 U.S. at 357-58, Justice Brennan noted that:

> "Respondents . . . fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."

In contrast, §514(a) expressly demonstrates the intent of Congress to preclude "even harmonious state regulation touching on," *i.e.,* "relating to," pension plans subject to ERISA.

[61] See n. 58, *supra.*

sion plans merely incidental or collateral. On the contrary, Chapter 156 applies only to employers who maintain private pension plans and only as against benefits thereunder.

Moreover, it is clear on the face of §514 that Congress did not intend to limit itself to the preemption of only those state actions which directly affect employee benefit plans, as distinguished from those which only indirectly affect such plans. This is seen in §514(c)(2), 29 U.S.C. §1144(c)(2), which provides that:

> "(2) The term 'State' includes a State, or any political subdivision thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.*" Emphasis added.

It is also seen in §514(b)(4), 29 U.S.C. §1144(b)(4), which expressly excepts from §514(a) "any *generally applicable* criminal law of a state" (emphasis added). As pointed out in *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin,* 599 F.2d 205, 207 (7th Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980):

> "This provision indicates an intention that the word 'relate' extend even to laws of general applicability (as well as an intention to preempt criminal statutes limited in application to welfare benefit plans). The exception would otherwise have been unnecessary."

The original House and Senate versions of the bill that ultimately became ERISA, H.R. 2, 93d Cong., 1st Sess. (1973), would have limited federal preemption to areas expressly regulated by ERISA, *i.e.,* to areas of conflicting or duplicate state law.[62] However, the Conference Com-

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[62] The House version, §514 of H.R. 2, 93d Cong., 1st Sess. (1973), actually enumerated the specific areas of federal preemption:

(Footnote continued on following page)

mittee rejected that approach in favor of applying the principle of preemption in its broadest and most comprehensive sense. This is expressly stated in the Conference Report:

> "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate

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(Footnote continued from preceding page)

> "It is hereby declared to be the express intent of Congress that . . . the provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies . . . [and] that the provisions of parts 2, 3, and 4 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the nonforfeitability of participant's benefits in employee benefit plans described in section 201(a) or 301(a), the funding requirements for such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension benefits under such plans." 120 Cong. Rec. 4742, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4057-59.

The version of H.R. 2 approved by the Senate on March 4, 1974, limited federal preemption to the subject matters expressly regulated by the bill:

> "Sec. 699. RELATIONSHIP TO STATE LAWS
>
> "(a) PRE-EMPTION OF STATE LAWS.—It is hereby declared to be the express intent of Congress that . . . the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . . ." 120 Cong. Rec. 5002, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 3820.

commerce." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 383 (1974), III Leg. Hist., at 4650.

In introducing the Conference Report, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, made what must stand as the clearest and most unequivocal statement of the intention of Congress in §514(a) in the following terms:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense* to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4745-46; emphasis added.

This was echoed by Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Labor Education, who stated:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . . *The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.* Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under code of law—which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b)." 120 Cong. Rec. 29197, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4670-71; emphasis added.

Thus, not only is the express language of §514(a) the broadest possible that could be chosen, but all of the satements in the Conference Report and the accompanying statements of the proponents of the legislation clearly indicate that the use of such broad language was quite deliberate.[63]

Under the circumstances, it is not the least surprising to note the ever-growing list of court of appeals decisions striking down one or another state attempt at legislation relating to and affecting employee benefit plans, *e.g.*, *Standard Oil Co.* v. *Agsalud*, —— F.2d ——, 318 BNA Pens. Rep. D-1 (9th Cir. 1980); *Azzaro* v. *Harnett*, 553 F.2d 93 (2d Cir. 1977), *aff'g without opinion* 414 F.Supp. 473 (S.D. N.Y. 1976), *cert. denied*, 434 U.S. 824 (1977); *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights & Opportunities*, 603 F.2d 214 (2d Cir.

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[63] In light of the present litigation, the statement made by Senator Jacob Javits, Ranking Minority Member of the Senate Committee on Labor and Welfare, explaining the reasoning of the Conference Committee in broadening the preemption provisions from those in the House and Senate versions of H.R. 2, is particularly worthy of note:

> "Both House and Senate bills provided for preemption of State law, but . . . defined the perimeters of preemption in relation to the areas regulated by the bill. *Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.*
>
> "Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, *the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exception—the displacement of State action in the field of private employee benefit programs.*" 120 Cong. Rec. 29942, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4770-71; emphasis added.

1979), *aff'g without opinion* 468 F.Supp. 490 (D. Conn. 1978), *cert. denied,* 444 U.S 1031 (1980); and *see Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin, supra,* 599 F.2d at 208-10.[64]

In an effort to show an exception to the breath of §514 (a), petitioners cite *American Tel. & Tel. Co.* v. *Merry,* 592 F.2d 118 (2d Cir. 1979), where the court held that ERISA does not preclude enforcement of a state court support order against the pension of a divorced retiree. However, that holding requires no exception to §514(a), but the construction of §206(d)(1) of ERISA, 29 U.S.C. §1056(d)(1)—joined in by the Secretaries of the Treasury and Labor[65]—as permitting the payment of benefits under a pension plan to fulfill marital or other intrafamilial obligations as an exception to the general prohibition of the assignment or alienation of benefits. To the extent Congress is deemed, in ERISA §206(d)(1), to have authorized the application of pension benefits to such intrafamilial obligations, the mere fact such obligations arise under state law is irrelevant to their enforcement and raises no true question of preemption.[66]

Petitioners' reliance on the decision of this Court in *New York Telephone Co.* v. *New York State Dept. of*

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[64] *Wadsworth* v. *Whaland* and *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin, supra,* though actually holding against preemption, did so on the basis of specific statutory exceptions, after strongly enunciating the principle of broad construction of §514(a).

[65] *See American Tel. & Tel. Co.* v. *Merry, supra,* 592 F.2d at 125.

[66] *Stone* v. *Stone,* 632 F.2d 740 (9th Cir. 1980), arrived at the same result as *American Tel. & Tel. Co.* v. *Merry, supra,* in a community-property context, by treating the wife as a participant with standing to assert a claim to benefits under the plan, relying upon this Court's dismissal of the appeal in *In re Marriage of Campa,* 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed,* 444 U.S. 1028 (1980).

Labor, 440 U.S. 519 (1979), is no less misplaced, although for different reasons. The question presented there, as stated by the Court, was "whether the National Labor Relations Act, as amended, *impliedly* prohibited the State of New York from paying unemployment compensation to strikers." 440 U.S. at 522; emphasis added. Further in its opinion, the Court noted that: "Pre-emption of state law is sometimes required by the terms of a federal statute [citation omitted]. This, of course, is not such a case." 440 U.S. at 540. To leave no doubt, the Court concluded its opinion with the statement that "a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the *unexpressed* intent of Congress." 440 U.S. at 545; emphasis added.

Further, the Court, as it made clear throughout its opinion, was concerned with what was basically a question of accommodating two *federal* statutes contemporaneously enacted—the National Labor Relations Act and the Social Security Act—state law being involved only by virtue of authority delegated to the States by the latter statute. Here, in contrast, there is no question of accommodating the policies of two federal statutes; only one, ERISA, is involved. Moreover, the question here is not one of *implicit* preemptions; there is no need to speculate about any *unexpressed* intent of Congress. In §514(a) of ERISA, Congress has *expressly* ordained preemption without requiring or even permitting inquiry into the purpose of the state legislation.

Indeed, even if that were not the case, it necessarily follows, assuming this Court agrees, as submitted in Point I, *supra,* that ERISA §203(a) codifies and authorizes the pre- and post-ERISA Treasury sanction of workers' compensation benefit integration in pension plans, that Chapter 156 then "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. The entire genius of ERISA was that there be a single source

of governing law for pension plans, rather than fifty or more separate systems governing the operation of such plans.[67] If New Jersey is permitted, by Chapter 156, to establish for the GM Pension Plan and pension plans like it one rule applicable to New Jersey pensioners and an entirely different rule applicable to those in every other State in which the employer does business and maintains its pension plan, there is nothing to prevent every other State from adopting a similar—or, worse yet, slightly different—rule within its borders. The result would be a crazy-quilt of conflicting state regulation in which no pension plan would have the same benefit structure and the same meaning in any two States.[68] It is respectfully submitted that such a result cannot be countenanced and is not to be countenanced under the Supremacy Clause of the Constitution.

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[67] The Committee on Education and Labor of the House of Representatives, pursuant to an express delegation of authority in ERISA §§3021 and 3022, 29 U.S.C. §§1221 and 1222, reaffirms in its "oversight" report the intentionally broad scope of preemption under ERISA §514(a). See H.R. Rep. No. 94-1785, 94th Cong., 2d Sess., at 46-48 (1976).

[68] That the circumstances under which workers' compensation benefits and the amount of such benefits depend upon state law does not constitute an exception to preemption under ERISA §514 (a), contrary to the suggestion of appellants in *Alessi* (Brief for Appellants 44-45). Obviously, state law is relevant only insofar as it creates the facts upon federal law operates.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit remanding this cause to the United States District Court for the District of New Jersey for the entry of judgment for respondent should be affirmed by this Court.

Respectfully submitted,

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